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Dissertation

Can contractualism really avoid aggregation?

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Abstract

This paper presents multiple reasons for why contractualists should adopt a weighted lottery in saving-lives cases. First, under both a principle allowing us to hold an equal-chance lottery as well as a principle that allows us to save the majority we can find individuals who could reasonably reject this. Second, Scanlon's case for saving the majority either involves aggregation or under its nonaggregative re-interpretation has other significant costs attached to it. Third, alternative nonaggregative cases for saving the majority are subject to a forceful objection by Taurek. Fourth, a weighted lottery also seems attractive in life-saving cases that partly involve smaller harms.

Introduction

Ever since its renewal through the work of Thomas Scanlon, contractualism has occupied an important role in ethical theorizing. Many believe that it avoids some of the fundamental flaws of consequentialism. These are, amongst others, revealed by some counterintuitive judgements on particular cases which the theory yields. We can easily construct examples in which it seems that we are required to accept tremendous suffering for a single person in order to avoid a small harm or bring about a small convenience for a large number of people. In Scanlon's Transmitter Room example, the continuous broadcasting of the world cup finale requires that we allow electrical signals to flow through the body of an electrician who has suffered a very unfortunate accident in the transmitter room. It strikes most as extremely implausible that there should ever be a number of viewers that could justify the continuation of the broadcasting, a result consequentialism seems committed to.

Contractualists believe that an action's wrongness stems from the fact that its underlying principle could be reasonably rejected by at least one person. In his early writings, Scanlon made use of two restrictions in order to provide individuals with an effective veto-power against the "tyranny of the majority" revealed by the Transmitter Room case. This, he thought, would prevent contractualism's yielding the counterintuitive results of consequentialism. The *Individualist Restriction* prescribes that when looking at what objections there are to a principle, we must look only at objections that could be brought forward by individuals (and not groups). The *Personalist Restriction*, by contrast, prescribes that the reasons individuals have for rejecting principles must be personal. That *I* stand to suffer under a certain principle is not a reason anyone else has.

Applying this to the Transmitter Room Case makes it clearer what Scanlon has in mind. The Individualist Restriction prescribes that only pairwise comparisons of the complaints of each of the many world-cup viewers with that of the electrician are permitted. Yet this would not necessarily prevent the sum of what all other members of the majority stand to gain from letting the electrician suffer from entering through the back door. A single individual could bring forward all the

individual reasons other world-cup viewers have for rejecting a principle that required us to save the electrician. Only the Impersonalist Restriction prevents this by allowing each individual to bring forward only how a principle affects them. So both restrictions work together so as to ensure that the unfortunate electrician in the Transmitter room example has an effective veto against the continuation of the broadcasting.

Yet it has also been argued that equipping contractualism with these two restrictions comes at a price. It seems more difficult under it to account for our judgements on particular cases that do seem to take numbers into account, i.e. in which the amount of persons that enjoy a certain benefit or suffer a certain harm do seem to matter. Challenges have come in different ways here. Norcross has pointed out that some of our widely shared practices such as automobile traffic regulations indicate that we do find it permissible to aggregate even minor conveniences for a large number of persons in order to justify severe harms to a few. More precisely, he argued that we find it permissible to let a few innocent persons die every year from automobile traffic for the sake of a convenient traveling speed for cars (Norcross 2002). Brink has argued that contractualism's anti-aggregative character establishes a "dictatorship of the worst off" and disallows that many marginally less severe complaints can outweigh very few slightly more severe complaints. Individuals' veto-power is so strong that contractualism requires us to prevent one person's death rather than a hundred people's paralysis (Brink 1993: 283). If our intuitions are correct, we want contractualism to yield the following judgements:

(1) YIELD	many small benefits	<	severe harm to few	(Transmitter Room Case)
(2) YIELD	many slightly less severe harms	>	few slightly more severe harms	(1000 paralysis vs. 1 death)
(3) YIELD	many harms of of equal severity	>	few harms of equal severity[1]	(5 deaths vs. 20 deaths)

In this paper, I shall only be concerned with contractualism's ability to account for cases of the third kind. More precisely, I will only look at what is commonly referred to as a *Taurek case*. These are characterized by four features: (1) All persons stand to lose the same, namely their lives; (2) there are no morally relevant differences between the persons; (3) they are conflict-situations, i.e. we can only save either group; (4) the groups do not overlap.

The aim is to assess whether contractualism can account for our intuition that we should spare more rather than less persons the same harm. As should become clear throughout the paper, none of my findings are specific to the harm of death but should equally apply to any other harm. It should be emphasized that a complete assessment of contractualism's ability to account for our

1 These cases are certainly not logically exhaustive but these are all the numbers challenges I am aware of.

number-sensitive intuitions would also have to include cases like (1) and (2).

What is at stake is not only whether contractualism is able to account for our intuition that we ought to save the majority in life-saving cases, but whether it is able to do so in a manner that is distinct from the consequentialist account. The consequentialist usually argues that saving the majority brings about the best state of affairs because it contains the highest sum of value. Scanlon, by contrast, does not base his case for saving the majority on its being better when more people are saved – how could he, given the Impersonalist and Individualist Restriction? With regard to their well-being (or utility, welfare etc.), each person has an equally strong complaint to bring forward. But under contractualism the complaints of individuals can also be based on considerations other than how their well-being is affected. Scanlon argues that in life-saving cases each person has a claim to have the value of their life respected. I will subsequently refer to this as the "respect for persons". If successful, this would not only establish a rival explanation for why we should save the majority in these cases. It would be a preferable explanation in so far as it would not be subject to Taurek's objections (1977) to a case for saving the majority that is based on its being better when more people survive. I will come back to these problems in more detail in the last section of this paper.

In order to be successful, the contractualist must show that alternative principles which allow us to do something other than save the majority can be reasonably rejected by at least one person. The two most prominent candidates for alternative principles are an equal-chance lottery (EC-lottery) and a weighted lottery. Saving the majority, an EC-lottery, and a weighted lottery are what I will call *decision procedures.*

The paper is structured as follows. In the first section, I present Scanlon's argument for why an EC-lottery fails to show respect for some persons. As his criticism is not very likely to impress the EC-advocate that defends an alternative account of what the respect for persons requires, I suggest a line of argument how the contractualist could reject it. In the second section, I argue that Scanlon's procedure satisfies the respect for persons but is unfair while a weighted lottery is both fair and satisfies the respect for persons. In the third section, I argue that Scanlon's case for saving the majority has the additional problem of involving aggregation, contrary to contractualist's intentions. It can also not be re-interpreted so as to avoid it, as Kumar would have us believe. In the fourth section, I argue that there is an alternative nonaggregative case for saving the majority which should, however, be avoided because of an objection Taurek raised against it. In the fifth and last section, I discuss the general implications of my findings for contractualism.

1. Why the contractualist can reject equal chances

According to Scanlon, respecting a person's personhood requires a decision procedure that registers each person's claim as a positive reason in favor of the action that satisfies it (Scanlon 1998: 233).[2] If a principle gives positive weight to some persons' claims but not to others, the latter have a complaint against it. This complaint is reasonable if under all alternative principles no other person has an equally strong complaint. Scanlon argues that assigning each person's claim a positive weight will lead us to save the majority rather than give each person an equal chance to be saved. Since each person stands to lose the same in life-saving cases each gives us an equally strong reason to save them.

Consider a decision to save A or B&C. Since all stand to lose the same, all have equally strong claims to be saved. After we have established a tie between A's and B's claim, C must break the tie in favor of saving the majority. Otherwise, her claim is not given positive weight (ibid.). A principle which allows us to give each person an equal chance, by contrast, does not show respect for persons. This is because not every person's presence is given positive weight. It is important to notice that saving the majority is not the only way to give positive weight to a person's claim. If this were Scanlon's claim, it should be suspected of begging the question. In a moment, I shall look at a weighted lottery, a procedure that Scanlon acknowledges as giving each person's claim positive weight in the way he envisioned it.

To assess whether Scanlon's objection to an EC-lottery is right, it is useful to draw the distinction between making an *actual difference* and making a *counterfactual difference*. When we want to know what difference a person makes it seems natural to ask what would have been the case had she been absent. This notion I shall call "making an actual difference"[3]. But we can also ask what difference a person makes by looking at what would have been the case had she been absent together with another person(s). This notion of making a difference I shall call "making a counterfactual difference".

Consider a decision to save A or B and take an EC-lottery as the decision procedure. We are required to give A and B a 50 percent chance to be saved. A is given positive weight because in her absence one would be required to save B straightaway. The same holds for B. Both have a direct impact on the procedure's output. Now consider the case A against B&C. What difference does C's

2 I think Scanlon's "respect for persons" has fairness already built into it as each person must make the *same* kind of positive difference. For analytical purposes, however, I shall distinguish between fairness and the respect for persons throughout the paper.

3 Of course the notion of "actual difference" is also counterfactual in the sense that we look at what would be the case *if a person were absent*. But this is not the relevant contrast here and one should not be confused by it.

presence make? She neither affects the decision procedure's output (it stays "give each a 50 percent chance to be saved") nor is there any other way in which her claim is registered as a positive reason for saving her, one might say. Thus, Scanlon argues, her claim is not given positive weight and her personhood is not respected (ibid.).

However, as multiple commentators have pointed out, if we change the level of description we can indeed say that every person makes the same kind of actual difference under an EC-lottery (Dogget 2013: 307, Otsuka 2006: 114). If we look at things under the description "saving the bigger" and "saving the smaller group" we will not notice how every person makes such a difference. Take a choice between saving A or B&C&D. What D's presence does is it changes the output from "if the coin flips heads, save B&C" to "if the coin flips heads, save B&C&D". We cannot just save B&C. D's presence ensures that the agent must save her, if the coin determines that one ought to save the bigger group. As this is true of each person, all seem to be given positive weight.

Scanlon further argued that given that an agent must not even know whether each group comprises of more than one person in order to know what to do, there must be some sort of disrespect for persons involved. But this is simply not true. An agent needs to know how many persons are present in each group so that once the coin has determined which group to save, she knows which persons to save (because there is an obligation to save all of them).

What the disagreement between Scanlon and advocates of an EC-lottery reveals are two different conceptions of what it means to give a person's presence positive weight and, thus, what the respect for persons requires. Scanlon fails to notice that the EC-advocate conceives of our relation to persons as that of a special bond. It holds between us and each particular person and thereby forbids us to treat them as interchangeable. This is because each person is unique (or even unique to themselves). I think an EC-lottery does indeed register each person's presence as a positive reason in favor of satisfying her claim – why else do we have a requirement to save all group-members if the coin determines this? But the advocate of the special bond conception of personhood insists upon an EC-lottery because this expresses her refusal to count the claims such that each registered claim tips the balance closer into the direction of the person's preferred action-path. This, in turn, seems to me the case because there is no way to do so without treating persons as interchangeable sources of reasons or value, which is incompatible with the notion of a special bond. Only an EC-lottery gives expression to this special bond by acknowledging the conflict of interest we are in when faced with a decision in which we ultimately have to let one or more persons down[4]. Scanlon, by contrast, is happy to assign some sort of numeric value to the claims of

4 This conception of personhood is set out by Kamm as a potential line of criticism to her Aggregation Argument in Morality, Mortality, Vol.1 (p. 99-101)

person such that they can become comparable, interchangeable, and can be added. Whether or not this can be done without *aggregating* claims, we shall see in a moment.

I think nonetheless that the contractualist should reject this conception of what the respect for personhood requires. It has implications that I take to be counterintuitive enough so as to allow us to reject it. First, it would require us to hold an EC-lottery in a decision to save one person or the rest of humanity. More importantly, as some might be willing to bite this bullet, how can we argue under such a conception of the respect for persons that we should spare A the loss of her life rather than B the loss of her finger? One might respond that the conception of the respect for persons advanced by the EC-advocate only requires us to conceive of our relation to a person as that of an unbreakable bond in cases that involve death. But why should this be so? If it is due to the fact that each person's life is unique to them and the resulting fact that no person can be compensated for the loss of something so special with another person's being spared a harm, why should this not equally apply to the loss of a finger? So I think this conception of the respect for persons will inevitably entail the untenable view that we should hold an EC-lottery even in those cases.

2. Why the contractualist should hold a weighted lottery rather than save the majority

While we were able to find a sense in which every person made an actual difference under an EC-lottery, i.e. had a direct impact on the procedure's output, this is not true of Scanlon's case for saving the majority. As many have pointed out, it is unfair because not every person makes the *same* kind of positive difference under it (Saunders 2009: 283-84, Dogget 2013: 307, Otsuka 2006: 114).

Let's consider a choice between saving A or B&C. If we are required to save B and C each of them makes an actual difference. Take either away and the output changes from “save the majority” to “give each a 0,5 chance” (assuming that Scanlon can say that we are required to give each a 50 percent chance). Yet A only makes a counterfactual difference. Only once either B or C are absent does A ensure that the decision procedure's output is “give each a 0,5 chance”. The same holds for D in a decision to save A or B&C&D. But does this not mean that A and D can reasonably reject a principle that allows us to save the majority? D is what could be called an “excess-member” of the majority as her presence is not required to establish the majority and, thus, her absence has no impact on the procedure's output. We might say that D cannot reasonably reject our saving the majority because, as Kamm once put it, the object of her claim has won anyway (Kamm 1998: 133). So we can expect do so with D's hypothetical consent. But what about A's claim in a choice between saving A or B&C? Her claim has not won anyway and counting her claim does not help

her cause in anything more than a counterfactual sense. As fairness requires that each person makes the same kind of difference and not each person has an impact on the output, it seems indeed that Scanlon's procedure is unfair.

Compare this to a weighted lottery. Here, a group's chance to be saved has to be adjusted to the number of persons it consists of such that each group's probability of being saved is proportional to its size. Thus, in a case of 3vs1 we are required to give a 0,75 chance to the three and a 0,25 chance to the one (0,8 vs 0,2 in 4vs1, and so on). This satisfies Scanlon's criterion for the respect of persons. Each person's claim is given positive weight in an additive manner such that each person's presence tips the balance closer towards saving her. It is also perfectly fair because each person's presence changes the output. Consider a choice between saving A or B&C. Take away A and the output turns from "give a 75% to A and B, and give a 25% chance to C" to "give A and B a 50% chance". The same holds for B and C (and all other possible group sizes).

One might say there is a certain sense in which not every person has the same impact on the output under a weighted lottery. In a 999vs1 case, for example, adding a person to the group of one will increase the group's probability of being saved only from 0,01 to 0,02. In other cases, by contrast, persons can induce a probability change as big as 0,5. But what is equal, we can respond, is not the shift in probability conceived of in absolute percentage points induced by a person's presence, but the fact that each person has the same impact relative to group size. The WC-advocate can openly admit that there are cases in which some persons' chance of being saved is of fairly low utility to them. This is not what fairness is about. It is about *expressing* equal concern for every person.

But, one might say, why does fairness require that every person has an impact on the output? Why can fairness not be shown "within" the procedure (rather than its output), as it were, that is, by the way that the procedure *registers* each person? In this sene, every person of the minority makes a difference even if we are required to save the majority. What Dogget and Otsuka fail to notice, one might say, is that Scanlon argues that a person's presence must only count in favor of saving the group of which she is a member (Scanlon 1998: 234). This account of fairness does not imply that each person must have an impact on the procedure's output. Every person makes the same kind of difference in so far as she is registered by the procedure as a reason counting in favor of satisfying that person's claim – it just so happens that there are not enough claims in the case of the minority. Persons might make the highest equal difference under a weighted lottery, as having an impact on the output is making more of a difference. But still, we might go on, respect for persons does not require that each person makes the *highest* possible difference. *Some* difference suffices.

I think this line of argument is unconvincing. According to Scanlon's original method of

assessing whether a person has a reasonable complaint against a principle, we must look at whether under any alternative principle there is someone who has an equally strong or stronger complaint. Take, again, a decision to save A or B&C. It seems clear that A can reasonably reject a principle allowing us to save the majority because under all alternative principles no one has an equally strong complaint. A principle which required us to hold a weighted lottery does not make B and C as much worse off as A is made worse off under a principle allowing us to save the majority.

In What We Owe to Each Other, Scanlon assumed that both a weighted lottery and saving the majority are fair and satisfy the respect for persons. He then made his case for saving the majority by putting forward his prior-randomization argument against a weighted lottery. The upshot of this argument was that every person can reasonably reject a weighted lottery. He claimed that individuals' complaints must be assessed from a standpoint from which we don't know who will end up obtaining the positions A, B, C, etc., i.e. who will end up in the bigger and smaller group(s) (Scanlon 1998: 204). Not knowing whether one will end up in the bigger or smaller group and assuming that each person has the same chance of ending up in either group, one's chance of being saved is maximized by a principle that requires us to save the majority. If every person has the same chance of ending up in the bigger group, each person's chance of being saved is 67% in a case of 2vs1, 75% in 3vs1, and so on. Thus, given that a weighted lottery assigns a probability lower than 1 to the majority's being saved, everyone's chance of being saved is reduced. In some cases it will only be reduced by a tiny bit, as, say, in a case of 999vs1. But still, the probability is reduced. Therefore, Scanlon argued, a weighted lottery fails to provide each person with the highest equal chance.

The plausibility of the argument depends crucially on the plausibility of the assumption of prior randomization. The terms “bigger group” and “smaller group” are a definite descriptions which pick out different individuals in different possible worlds. Thus, any person can fall under one description now and under the other later. Are some people overall more likely to fall under either description than others? As Saunders himself acknowledges, this becomes less likely the more general the principles we are looking at.

> *(...) we may say that, if we are deciding on a general policy, to govern all sorts of conflict cases arising in society, such inequalities are unlikely. David might know that he is more likely to be alone at sea, but this would not be the case when he needs rescue in other contexts - such as from a burning building or when needing scarce medical resources – so it may be in his overall long-run interest to agree to the general policy of saving the greater number. (Saunders 2009: 283)*

Given that Scanlon's contractualism prescribes us to look at generic reasons, i.e. reasons attached to positions describable in general terms, there is a pressure to look at the more general principles under which every person can be expected to have roughly the same chance of ending up in either group.

Yet it seems to me that Scanlon can only put forward this argument once it has been shown that his case for saving the majority respects every person – this is at least the case if we conceive of a principle's failing to respect a person as a sufficient reason to reject it (which it seems to me Scanlon did), and it can be shown that there is an alternative principle that respects that person and does not fail to respect any other. Since all that Scanlon's argument shows is that members of the majority could complain that their probability of being saved is being reduced, the complaint of the members of the minority should ground a reasonable rejection of a case for saving the majority.

3. Is Scanlon's tie-breaking argument a nonaggregative case for saving the majority?

There is another problem attached to a contractualist case for saving the majority that would have to be addressed once the problem of unfairness had been solved. Remember that contractualism was said to avoid some of the problems of consequentialism by introducing two restrictions. These were supposed to prevent the aggregation of the value or claims of different persons. But Otsuka has argued that Scanlon's case for saving the majority relies upon exactly that (Otsuka 2000: 289-90). In order to assess whether he is right, let's consider Scanlon's tie-breaking argument again. In a decision between saving A or B&C, we compare A's and B's claim at the first stage, only to find that they are equally strong. In the second stage C's claim must tip the scales in favor of saving B and C - otherwise she can complain that her claim is not given positive weight. While the contractualist case for saving the majority might initially seem nonaggregative as it relies only on C's reasonable complaint to alternative principles, Otsuka argues that it is secretly aggregative. This is because within the procedure we add C's claim to B's, such that the combined weight of B's and C's claim outweighs A's claim. The two-stagedness of the procedure should not blind us to the fact that aggregation can also occur conjunctively. There must not be a single moment in time, as it were, at which we compare two quantities with one another.

To this, Kumar has objected that there is also a nonaggregative interpretation of Scanlon's argument (2001). As he puts it, we should regard A's and B's claim at the first stage of the procedure as using one another up or canceling one another out. Put yet differently, the reasons on each side do not *balance* one another – at least not in so far as this implies that they remain “on the

scene". Instead, they *neutralize* one another and after that "vanish from the scene", as it were (Kumar 2001: 167-68). Kumar then goes on to argue that once the weight of A's and B's claims has been used up, we look at what other claims there are and find that C's claim to be saved remains standing with its full force. Now we cannot take this reason and add it, as it were, to our reason to save B such that *they together* outweigh our reason to save A. Instead, we simply find that C's claim is not balanced by any other person's claim (ibid.). Notice that C's reason is perfectly personal, as it only incorporates the way in which C is affected by the principle. So Scanlon's Impersonalist- and Individualist Restrictions are satisfied. From this, Kumar goes on to argue, we derive a moral obligation to save C - and only C.

As an explanation of the kind of reasoning that underlies our judgement that we should save the majority, this is a fairly complicated story that might already have a prima facie disadvantage due to its complexity. But leaving such issues aside, I think it is fairly clear that if this narrative explains our intuitions there cannot be any aggregative reasoning involved. For even if C could, under violation of the Impersonalist Restriction, bring forward the combined weight of what B and C stand to lose, this would entail an obligation to save both B and C - even if only C were allowed to advance it. All that we can say is that B's and C's claim *affect* one another in so far as C's claim only "survives" because she happens to be with another person that uses up the weight of A's claim such that her own claim stands unchallenged. But then how is this a case for saving the majority? Kumar goes on to argue that the moral requirement to also save B is triggered only once the agent finds that B can be saved alongside C without making anyone worse off. Thus, the second obligation is quite different in nature from the first. It is a Pareto obligation and logically subordinate to the first one.

A virtue of Kumar's interpretation is that it provides a convincing response to another challenge raised by Otsuka, who demands us to explain the following fact. Why do we feel no inclination at all to give B and C a 50% chance to be saved and A no chance to be saved in a case where we can save A or B or C, while we do so in a decision to save A or B *and* C? He goes on to ask:

> "*What grounds have Kamm and Scanlon to insist that the adjustment must be so radical—i.e., that in comparison with the two-rock case [in which we can save A or B] the first person's chance of being saved must plummet from 50 percent to zero, while the second person's skyrockets from 50 percent to 100 percent, which will also be the third person's chance of being saved?" (Otsuka 2006: 116-17).*

According to Otsuka the best explanation for the radical drop of A's probability to be saved from

50% to 0% is that we are moved by the "overwhelming magnitude of the combined weight of the second and third person's claims" because "the first person's claim could be so decisively defeated only if it is overwhelmed by the combined force of the second and third person's claims" (ibid.). But Kumar's argument provides an equally good explanation for A's decisive defeat: A's claim has been neutralized by that of another person. This is why there is a plummet from 50 percent to zero. C's probability "skyrockets" because her claim is the only one that "survives", which makes it plausible that the probability should skyrocket. B's probability "skyrockets" because she is lucky to be on the same island as C.

Timmermann acknowledges that Kumar's solution allows Scanlon to avoid aggregation but argues that this comes at a heavy price. The price has already shimmered through above when I said it was possible to balance A's claim with *either* B's or C's claim. I had pretended there that it didn't matter whose claim we took. But, one might say, surely it does matter. This is because whoever's claim we take to confront A's claim determines on whose behalf we will eventually save the bigger group. According to Timmermann, both A and either B or C (depending on who we use to establish the tie) can reasonably reject this way of going about. A, because "he never stood a chance" and B/C for "his life has allegedly been neutralized by the value of someone else's life on a distant island, he is saved just because he happens to be on the same island (...)." (Timmermann 2004: 109). B&C are treated in a way persons should never be treated, namely as "interchangeable objects."

I don't think this is by itself a convincing argument. First, A did stand a chance, namely that of ending up in the bigger group. That we should "reshuffle the moral deck" by holding another lottery - ending up in either group can already be conceived of as a lottery - is exactly what Scanlon doubts (Scanlon 1998: 234). Also, the full weight of A's claim has been taken into account. It has been assigned the same strength as that of all others who stand to lose as much. Second, the arbitrariness of taking either B's or C's claim first is unproblematic because we can expect B's hypothetical consent to such going about. Why should B not be indifferent with regard to the fact that we had chosen her rather than C as "going first" in the method of confronting individuals' claims?

Nonetheless, there does seem to be something to Timmerman's moral arbitrariness worry. I think a case brings this out well. Suppose we have decided that we ought to direct our ship to the island on which B&C are stranded. In the course of doing so our ship starts leaking. Luckily, we have a small inflatable boat but that will only fit one person. It is too late to go back and attempt to save A, so our decision is between saving B or C. Given that our obligation to save C has been triggered prior to our obligation to save B, it seems that we should save C rather than B. But this is

unacceptable given that we had chosen B as the tie-establisher and C as the tie-breaker on purely arbitrary grounds.

The force of the objection becomes even more evident in cases involving harms of different severity. Take a case in which you can save either A from death or B from death and C from losing a finger. What would Kumar's suggestion be how we should deal with such a case? If we allow for C's lost finger to be severe enough to be morally relevant to A's and B's death, we could initially only derive an obligation to save C. Given that A's and B's claims had cancelled one another out and we are not allowed to compare A's claim to B's and C's claim combined, this seems to be the natural consequence. But then it would be even more worrying that B is only saved because she happens to be with a person that stands to lose a finger.

It is also highly doubtful to me that the shift in the normative situation from a conflict-case to one that allows for a Pareto improvement is plausible. Consider Kumar's argument for what triggers the additional requirement to save B:

> *"Once that decision has been made [to save C], however, the rescuer no longer finds herself facing the same kind of practical dilemma to which the Kamm-Scanlon proposal is meant to apply. Rather, what the rescuer faces is a sinking boat with people in it, her duty clearly being to save as many lives as she can." (Kumar 2001: 167)*

But have we not, in deciding that we are morally required to save only C (in the decision between A or B&C), also decided that we are not morally obliged to save B? A moral reevaluation of the situation would be plausible if something morally relevant had changed about the situation. If, for example, we were heading towards the island and, on arriving, find that there is besides B&C and third person, D, whom we can also save without any sacrifice, the situation would be somewhat different. In such a case we had discovered a new fact, we had gained knowledge that we did not have in the moment of making the first decision. But in the original case we know right from the start that B is present on the island but decide that we are not morally required to save her. It is strange that our moral evaluation of a situation should change despite no changes in our epistemic situation.

Otsuka makes this point in a similar way when he asks: "How can Kumar maintain that you ought to save the second person too if her claim has been neutralized by the first person? Would the second person really have no objection if she were not saved?" (Otsuka 2006: 119). Yet Otsuka does not question the normative shift but the notion of claims being neutralized. I think questioning the plausibility of the normative shift is more promising as an argument since to Otsuka's objection Kumar could simply respond that the person's claim had been neutralized only for the first decision

(i.e. to which island one should head). In the second decision it will no longer be neutralized by A's claim since the option to save A is already from the table. This response will not do if the shift in the normative situation is implausible to start with.

But not only does Kumar's interpretation fail to explain a requirement to save B alongside C. As Otsuka has pointed out, it is subject to a reductio ad absurdum because the very notion that A's and B's claims cancel one another out in the first stage of the procedure seems to imply that it would be permissible to, when confronted with a decision to save A or B, save neither (Otsuka 2006: 120).

4. An alternative nonaggregative case for saving the majority?

However, Kumar's reinterpretation of Scanlon's argument is not the only nonaggregative case for saving the majority there is. Kamm has provided what she called her Aggregation Argument, a case for saving the majority that (despite its name) does not involve aggregation.

P1: Saving A is worse than saving A and C. (A < A + C)

P2: Saving A is as good as saving B. (A = B)

C1: Saving B is worse than saving B and C. (B < A + C)

As Hirose has pointed out, P1 underlies the Pareto Claim and P2 an impartiality thesis (Hirose 2001: 341):

(Pareto): If one alternative is better for some person than another alternative, and it is worse for no one, then it is better than the other.

(Impartiality): Two alternatives are equally good if they differ only with regard to the identities of the people.

Given that Pareto and Impartiality are fairly plausible and widely accepted, the argument is quite compelling. Neither seems to involve aggregation and both claims follow from the contractualist framework. Any one person that could be made better off under a certain principle without any other person being made worse off under all alternative principles could reasonably reject the latter. Furthermore, contractualism will declare two alternative principles as equally rejectable or non-rejectable if it varies only with regard to the identity of the persons that hold a particular ground for objection because the relative strength of the complaints is the same. Furthermore, despite being based on its being better when more people are saved, the argument does not weaken contractualism's explanatory power. As it is ultimately based on the claim of an individual, namely that individual which could be made better off without making any other person worse off, we would still have a contractualist-specific explanation of why we should save the majority.

However, I think Kamm's Aggregation Argument - even if nonaggregative - should not be

adopted by the contractualist. This is because it is still based on its being better when more people are saved and is thereby subject to the problems attached to such a case pointed out by Taurek (1977). This would deprive contractualism of an important advantage over consequentialism. Taurek made two central claims. First, there is no coherent sense in which it is impersonally better when more people are spared the same harm. This is because our concern for persons does not stem from the fact that they have some kind of objective value. This might be true of physical objects. In the case of persons, we care for them because it matter *to themselves* how well their life goes. The value of human beings is attitude-dependant. Second, such attitude-dependant value cannot be aggregated across persons. If death is bad due to being experienced in a certain way – or because it rids one of all good experiences – then how can more deaths be worse in a mind-independent or impersonal sense? This would seems to require an aggregate consciousness in which all those experiences were unitarily experienced.

Together, these two claims seem to imply that saving the five is only better *for the five* and not better simpliciter. It is not better *for the one person* if we save the five. If we want to acknowledge this fact, we should give each person an equal chance to be saved (Taurek 1977). On one (problematic) reading of Taurek, we cannot be required to save A from death rather than B from losing a finger as this would imply that it is not only better for A but better simpliciter. Yet, this implication can be avoided by the Taurekian. Despite not being worse in some mind-independent sense, she could say that it is worse simpliciter if A loses her life than if B loses her small finger in the following sense: not helping A is worse for A than not helping B is for B. Such a notion of worse simpliciter seems fully coherent. Also, there is no problem of justification involved. If reasonable, we can expect B to agree with the judgement that a world in which we don't help A is worse, full stop, even though it is worse *for* B. Taurek's conceding this would be fully consistent with a continued insistence on the fact that saving the majority in saving-lives cases is not *better* than saving the minority. This is because such a claim relies not only on the possibility of interpersonal comparisons of utility but also on the possibility of interpersonal aggregation of utility. To this, Taurek had a different objection: His inability to make sense of what it would mean for harms and benefits to add up across persons given that they are bound to a particular mind, as it were.

Tackling this latter worry seems to me difficult enough so as to want to avoid it. But whoever picks up Kamm's Aggregation Argument has to address the issue of how mind-bound harms can add up across persons. It seems to me that the contractualist should leave this problem to the consequentialist and should therefore not resort to Kamm's Aggregation Argument.

5. Implications for Contractualism

Given the substantial problems attached to a contractualist case for saving the majority, I argue that they should adopt a weighted lottery. Admittedly, this comes at the price of an inability to explain our intuition in these cases – given that most people find it fairly clear that we ought to save the majority. However, the burden of having to explain away these intuitions that is thereby picked up may not be overly big. Most people's intuitions are not particularly stable in these cases and a moment of empathy with members of the minority can make one seriously wonder. As any reader of Taurek's "Should The Numbers Count?" will probably agree, our intuitions are somewhat sensitive to whether we take a detached, "aggregative" view ("from nowhere") or a first-person perspective.

In total, adopting a weighted lottery seems to have more benefits than costs. It avoids aggregation as it is based only on the claims of individuals. More precisely, it is based on the reasonable rejectability of our saving the majority by members of the smaller group as well as the reasonable rejectability of an EC-lottery by members of the majority. Furthermore, given that such a case would not be based on its being better when a weighted lottery is held but on the unfairness (saving the majority) or failure to show respect for persons (EC-lottery) of alternative procedures, such a case would avoid Taurek's semantic objection to impersonal betterness.

Adopting a weighted lottery seems also advantageous in another way. Remember that the Individualist and Impersonalist Restrictions forbid us to aggregate the unfairness a certain procedure "inflicts" upon persons. The consequentialist, by contrast, can aggregate unfairness and say that the unfairness to the minority in a 2vs1 case is much smaller than then unfairness to the minority in a 1000vs999 case and that in the latter case its disvalue outweighs the disvalue of not saving more persons. This makes the consequentialist response more fine-tuned to our intuitions. She can say that we ought to save the majority in a case of 2vs1 but hold an EC- or a weighted lottery in a 1000vs999 case (Hirose 2004). To those who, like me, find saving the majority in life-saving cases with higher numbers and a close winning-margin dissatisfying (like in a 1000vs999 case), a weighted lottery seems a more satisfying response.

Last, Dogget has taken Scanlon to argue that the respect for persons does not require us to save the majority when we have to decide whether to save ten people from death and one person from a headache rather than ten people from death (Dogget 2013: 306-07). Call this case *Headache*. Dogget takes Scanlon to argue that not saving the majority in regular life-saving cases in unfair while not saving the majority in *Headache* is not. He takes Scanlon to argue that fairness requires only that "each like person make a like difference to what is permitted." (Dogget 2013: 307).

Therefore, the complaint that a principle does not show respect for a person can only be brought forward as a complaint by someone who stands to lose the same as all other persons. However, I do not think that this follows from Scanlon's conception of the respect for persons. Rather, I claim, it also requires us to save the majority in *Headache*. I have so far used the rather neutral expression of "giving positive weight to a person's claim" as Scanlon's criterion for showing respect for a person. Scanlon's original formulation, however, is "take account of the value of saving a person's life" (Scanlon: 232). This might lead one to think that the respect for persons is tied to the harm of death. But I think this cannot be what Scanlon means. By tying the respect for persons to either the harm of death or equal harms, Scanlon would have no means by which to require us to save one person from death and ten people from constant paralysis rather than one person from death. There is a reason why Scanlon never speaks of "fairness". His tie-breaking argument suggests that if we are able to create a tie in reasons to save either group such that there remains a non-used-up claim in either group, that claim or those claims must break the tie – no matter how serious the harm. In the Transmitter Room case, a tie never gets established because none of the world cup viewers' complaint is able to establish a tie with that of the electrician. They are what Scanlon calls "morally irrelevant" to one another. But once such a tie is established, it seems that by Scanlon's own criterion for equal respect, namely that positive weight should be given to each person's claim, there is no way to deny that the tiniest claim can tip the balance in favor of the majority. This implies that we should save the majority in *Headache*.

This is certainly not a very satisfying result for the contractualist. Answering the question "why should we save the majority?" in *Headache* by "because the person who stands to suffer a headache could reasonably complaint to a principle that allowed us to save the smaller group" makes one feel somewhat uncomfortable. Adopting the case for a weighted lottery seems to mitigate this problem a little bit. The person standing to suffering the headache would not break the tie but simply be granted the same probability impact as everyone else. One might even say her probability-impact can be adjusted to her harm.

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